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UNITED STATES BANKRUPTCY COURT

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SOUTHERN DISTRICT OF NEW YORK

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Case No. 12-12020-mg

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In the Matter of:

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RESIDENTIAL CAPITAL, LLC, et al.,

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Debtors.

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United States Bankruptcy Court

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One Bowling Green

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New York, New York

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September 3, 2013

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11:02 AM

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B E F O R E:

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HON. MARTIN GLENN

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U.S. BANKRUPTCY JUDGE

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2 (CC: Doc#4765) Debtors' Motion Pursuant to Section 105 of the
3 Bankruptcy Code and Rule 7026 of the Federal Rules of
4 Bankruptcy Procedure for Authorization to Establish and
5 Implement Procedures in Connection with Discovery Related to
6 Plan Confirmation.

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P R O C E E D I N G S

THE COURT: Please be seated. We're here in
Residential Capital, number 12-12020.

Mr. Kerr?

MR. KERR: Good morning, Your Honor. Charles Kerr of
Morrison & Foerster, on behalf of the debtors.

We are here today on the debtors' motion to establish
procedures for discovery relating to plan confirmation. We
filed our motion on August 20th as docket number 4765, and we
filed this motion after consulting with the creditors'
committee about what we can do to make sure that discovery in
the plan confirmation process is efficient, fair and run well.
And we made the motion pursuant to Section 105 of the Code and
Rule 7026, which we believe gives Your Honor authority to enter
this kind of order and control and manage discovery.

The purpose for why we're doing this, Your Honor, is
pretty straightforward. The procedures we proposed are
designed to keep a plan confirmation discovery process
organized and efficient, and -- but it's also designed to
reflect the specific context of this case. As Your Honor's
aware, the debtor has already gone through extensive discovery
and produced enormous amount of documentation. And the key
element of what this plan does is we're going to take all of
that discovery, all that paper, and put it into a repository
and make it available to anybody who is a participant in the

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1 plan confirmation discovery process; and we're doing that, Your
2 Honor, to avoid the duplication and excessive cost of having
3 repeated discovery requests coming in right and left on us.

4 THE COURT: Let me ask you a question about it. Am I
5 correct that all the documents that are going to be put in the
6 repository will be in electronic format, in a searchable
7 format?

8 MR. KERR: That's correct, Your Honor. What we're
9 putting them into is a -- it's called a relative e-database
10 (ph.); it'll be in searchable format. You can go in and
11 download documents, you can review documents, you can tag
12 documents, you can manipulate the documents any way you wish,
13 as soon as you're a participant and you get a license from the
14 thing. It'll be done at our cost, Your Honor.

15 THE COURT: Okay. And in the examiner's and
16 creditors' committee's investigation, what, there was about
17 nine million pages that were generated? Do I have that right?

18 MR. KERR: I'm not sure how many total. What we're
19 intending --

20 THE COURT: Because I know you're talking about
21 fourteen million-plus pages, and I was just trying to get an
22 understanding. And I think it was about nine million pages as
23 a result of the investigations.

24 MR. KERR: Well, let me clarify one thing, Your Honor.

25 THE COURT: Okay.

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1 MR. KERR: What we're putting in the repository are
2 the documents the debtors produced in response to the examiner.
3 The examiner may have collected documents from many other
4 places.

5 THE COURT: Okay.

6 MR. KERR: They're not -- we're not putting those in
7 the repository. What we're putting in are the documents that
8 we produced. And I think in our order, Your Honor --

9 THE COURT: Because in the motion you talked about
10 fourteen million-plus pages.

11 MR. KERR: That's correct, Your Honor. And in the --
12 paragraph 3(a) of the order, we list the document productions
13 that we have made before. And I don't have the numbers of each
14 individual (sic), but it'll be what was produced to the
15 examiner by the debtor, what was produced to the RMBS --

16 THE COURT: All right.

17 MR. KERR: What we've been producing and will produce
18 in the adversary proceeding, that'll all be in the repository;
19 what we produced in FGIC; and then a bunch of other variety of
20 document productions that we've made over the course of this
21 case.

22 THE COURT: Okay.

23 MR. KERR: So, Your Honor, essentially what we're
24 trying to do is make available everything that we've made
25 available to everybody else.

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1 These types of discovery protocols have been used in
2 other cases but fixed to reflect the unique nature of this
3 case.

4 THE COURT: Well, the major -- I mean, the objection
5 filed by the ad hoc group essentially is that in the other
6 protocols that you have identified, you've shifted -- you
7 require a showing of good cause for additional discovery. That
8 good-cause requirement was not included in the other protocols
9 that you've referred to.

10 MR. KERR: I think that's correct, Your Honor, but I
11 think those other protocols come up in -- I keep knocking that;
12 I apologize, Your Honor -- in a different context. We have --
13 I don't believe that -- in the Enron or the Lehman one, at that
14 point it was created, that amount of documents had already been
15 collected and were being put upfront by the debtors.

16 THE COURT: Lehman I'm not sure about, I mean, because
17 it was an examiner's investigation in Lehman and it generated a
18 lot of paper. But --

19 MR. KERR: It --

20 THE COURT: -- putting that aside.

21 MR. KERR: Okay.

22 THE COURT: I mean -- and I'm going to want to hear
23 from the objectors, but --

24 MR. KERR: Your Honor, if I can deal directly with the
25 objectors' --

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1 THE COURT: Yeah, go ahead.

2 MR. KERR: -- concern about this, because I think
3 their concern is misplaced, because this is what we're doing,
4 Your Honor: You know -- and Ms. Levitt here can provide more
5 details -- in the adversary proceeding, the JSNs served over --
6 I think, over 170 document requests. We objected -- we
7 responded to a bunch of them; we objected to a certain number
8 of them on the grounds that those requests really go to plan
9 confirmation issues.

10 Two things: One, when we were collecting documents in
11 response to all of those requests, we collected and produced
12 e-mails to every single one of those requests. So in fact, the
13 vast majority of documentation that would be called for, I
14 think, there has already been produced and we put in the
15 repository. Second, Your Honor, we are going to take the
16 position that the additional requests that the JSNs made in the
17 adversary proceeding that we contend are phase II or
18 confirmation, we're not -- we're going to take them as given.
19 We're prepared to meet and confer with them to determine what,
20 if any, additional documentation needs to be produced. They do
21 not have to demonstrate good cause to do that.

22 So therefore, Your Honor, the only potential impact on
23 the JSNs of that is if they now make new and additional
24 requests. And I would suggest, Your Honor, given the breadth
25 of requests that they have made, given the approach that we

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1 have taken and tried to produce documentation in response to
2 that, it's not unreasonable to put that burden on anybody who's
3 going to be making additional requests.

4 THE COURT: Okay. I understand your position.

5 MR. KERR: Okay. Well, Your Honor, again, I think the
6 plan is highlighted in our papers, and I can go through --

7 THE COURT: So this -- the one thing -- I -- I'm all
8 in favor of parties seeking to work out or resolve issues
9 between them. I don't appreciate when Friday night I get
10 something shot across the transom by the JSNs, which is their
11 own version of a proposed order, and then this morning I get a
12 further proposed amendment from the debtors. So when a
13 motion's filed, there are deadlines for a reason; you know, one
14 of those reasons is that I can actually prepare and not have to
15 continue to look at documents that I guess I would describe as
16 unauthorized, like the Friday-night submission by the JSNs.
17 And then of course you felt compelled to go ahead and make a
18 further tweaking.

19 It's one thing when a motion's filed, objections are
20 made and the parties work constructively and reach an
21 accommodation, which is not what's happened here.

22 MR. KERR: Well, Your Honor, what we attempted to
23 do -- you are correct; we filed a new version of the amended
24 order, but what we tried to do was, having gotten the JSNs'
25 filing Friday night, as we had done before, we looked at it; we

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1 thought there was new stuff in there; if it made sense, we
2 would try to adjust the order to try to do that.

3 What we tried throughout this process, Your Honor,
4 is -- we made an order -- I got a call from the JSNs after we
5 filed it; they raised some questions and concerns. I told them
6 that I would make -- we would make various adjustments. They
7 then filed their limited objection on, I think, last Thursday,
8 which raised new issues; in light of that, we said we would
9 make further adjustments, and which we did in our reply. And
10 then we got the order again, making new objections --

11 THE COURT: Right.

12 MR. KERR: -- on Friday night.

13 So, Your Honor, I apologize to the Court for --

14 THE COURT: No --

15 MR. KERR: -- filing stuff, but I'm trying to -- I'm
16 trying to reasonably take into account the issues they raise.
17 And if what they suggest makes sense and it makes sense for not
18 just us but for all parties, I'm more than willing to
19 incorporate that --

20 THE COURT: All right, let me --

21 MR. KERR: -- into the order.

22 THE COURT: -- let me hear from other counsel. Thank
23 you, Mr. Kerr.

24 MR. KERR: Thank you.

25 THE COURT: Does the committee want to be heard, or

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1 you're just joining in? Mr. Horowitz, you're just going to
2 join in with the debtor?

3 MR. HOROWITZ: Yes, Your Honor, we are joining in. I
4 just -- I guess, since I'm up here, I'll -- just want to make
5 clear, because I do think Mr. Kerr made it clear but I think
6 it's very important. I was involved in Lehman. In Lehman, the
7 process was that the debtor only felt -- wanted, for a matter
8 of efficiency, the debtor should only respond to a single set
9 of document requests. The committee served as a gatekeeper,
10 produced a single set of document requests. There were
11 meetings at Weil Gotshal with, like, sixty or seventy lawyers,
12 where everyone suggested, 'Well, you should add this; you
13 should add that.' And the result was a single set of document
14 requests.

15 Here, historically we've had sort of the equivalent of
16 that; we've had a number of different proceedings where
17 there've been document requests, including from the examiner,
18 including the JSNs. And it's worth emphasizing that that
19 original JSN document request was actually UMB and the ad hocs
20 together; there was a lot of duplication. When you took out
21 the duplication, it was about 140 items. That was before there
22 was a bifurcation. So that was really a document request that
23 the JSNs propounded, for all of the issues, phase I and phase
24 II, that they saw out there.

25 And we convinced the debtors, and I think it's

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1 important, that for purposes of this protocol, all of those
2 requests, even the ones that were put off, or at least
3 nominally put off, to phase II/confirmation, should be deemed
4 validly served; no need for a good-cause showing.

5 THE COURT: I'm not sure what that's going to mean in
6 the real world, because you can sit down and you can have a
7 meet-and-confer and hopefully you'll be able to reach agreement
8 on most issues and then, when you don't, what's the standard
9 the Court's supposed to apply in determining whether -- how to
10 resolve the disputes about remaining requests as to which you
11 haven't agreed?

12 MR. HOROWITZ: Well --

13 THE COURT: The way you drafted the protocol, but for
14 this change you're now making, or at least as the -- I'm not
15 sure it's the change in the protocol so much as your agreement
16 that you would treat the request that the JSNs made as -- what
17 they made earlier, as not having satisfied good cause. Does
18 that mean -- how --

19 MR. HOROWITZ: I think -- maybe we should be very
20 clear about this.

21 THE COURT: If there is a remaining dispute as to what
22 you're going to meet and confer on, what's the standard that
23 you believe the Court is supposed to apply in resolving the
24 dispute?

25 MR. HOROWITZ: Well, I think then we're no different

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1 off than we would be if we were just going through a standard
2 discovery process where they're allowed to propound new
3 discovery requests; the debtors and the committee can object.

4 There may be some additional disputes about what's the
5 appropriate scope of discovery with regard to some issues that
6 may come before the Court. I actually think that, because we
7 made clear, and the debtors agreed, that when they reviewed
8 documents the first time around, they shouldn't, and did not,
9 withhold documents on the grounds that they were only
10 appropriate to confirmation. The scope of that dispute is not
11 going to be particularly broad.

12 THE COURT: Okay. All right. Let me hear --

13 MR. HOROWITZ: But there may be those disputes and
14 they'll just be under the ordinary standards.

15 THE COURT: All right. Let me hear from the
16 objectors.

17 MR. SHORE: Good morning, Your Honor. Chris Shore
18 from White & Case.

19 THE COURT: What was the authority or justification
20 for the Friday-night filing?

21 MR. SHORE: Well, I apologize for the timing of it.
22 There was a medical emergency that day. We were going to -- we
23 were going to file -- we had noticed in our objection that we
24 were going to file it after working with the debtors. We had
25 hoped to get it to you either Thursday night or Friday morning,

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1 and it just got pushed to Friday night, and, apologize for the
2 late time of that.

3 THE COURT: I don't work on Saturday, so that meant
4 yesterday.

5 MR. SHORE: Yeah. We have one overarching objection
6 on this, and then I can address some of the specifics. A
7 couple of -- was it a couple weeks ago? Yeah, I think it was a
8 couple of weeks ago -- there was a concession made on the
9 record that Your Honor had pressed the debtors and the
10 committee to make, delinking the adversary from confirmation,
11 and we were hopeful that that would continue. It's just
12 unclear, from the state of the protocol right now, what the
13 debtors' intentions are and what the committee's intentions
14 are, with respect to phase II and confirmation. And they both
15 have been all over the law on that, with it falling generally
16 into two explanations: 'We're going to have certain phase II
17 issues tried at confirmation and certain issues won't be tried
18 at confirmation, or we're not going to try any phase II issues
19 at confirmation but that certain rulings at confirmation sought
20 in connection with confirmation will render phase II moot.'

21 We have two simple questions which we believe we need
22 answered to fully understand what's happening and how to
23 prepare: Are we calling the adversary proceeding at
24 confirmation? And if we are calling the adversary proceeding,
25 what phase II issues are going to be tried? I've asked that

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1 question; I've received conflicting answers from people. We
2 need to know.

3 And so that's why, in our proposed order, we put in a
4 provision which said, 'Just let us know.' They may say --

5 THE COURT: Well, whether they -- whether the
6 discovery protocol includes it or not, as I did with respect to
7 the phase I issues, it's -- I fully intend to require the
8 parties to arrive at an agreed statement of issues to be tried
9 for phase I; it'll happen as part of -- still my intention at
10 this moment is to try it as part of confirmation, but wouldn't
11 call it the phase II issues raised in the adversary
12 proceedings. All right? I did it with respect to phase I.
13 While you initially had some disagreements, you were able to
14 work out an agreed statement of issues. I mean, ordinarily --
15 frequently that would happen as part of a joint pre-trial
16 order, and the pre-trial order supersedes prior pleadings. But
17 because of the scope of the issues, the expedited time frame,
18 I've required this joint -- because I wanted the certainty of
19 knowing what issues are going to be tried, and I'm going to
20 want that certainty again. I don't know that that's going
21 to -- that that -- I don't view that as part of the discovery
22 protocol.

23 I haven't put you to the task yet of coming up with
24 that joint statement of issues. We've got the trial of phase I
25 scheduled to begin October 15th. It does seem to me that

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1 because of the schedule for everything that's going on, that
2 sometime in -- you can start talking about it now, because
3 before the end of September I am going to want a statement of
4 issues for phase II. So that -- I want certainty as much as
5 you seem to want the certainty about that. I want everybody to
6 know, when we go forward with an evidentiary hearing, what are
7 the issues the Court's going to consider. I think it's the
8 most orderly way to do it.

9 So I don't view that as part of the discovery
10 protocol; I view that as part of trial preparation for phase
11 II. And essentially that statement of issues for phase I is
12 what would ordinarily be part of a joint pre-trial conference
13 order. We did it slightly differently here.

14 Okay, so you're going to -- there is going to be a
15 statement of the issues for phase II.

16 MR. SHORE: As it stands, though, the longer we delay
17 the provision of that list and get on the record the debtors'
18 and the committee's views with respect to whether we're doing
19 any of phase II or all of phase II at confirmation, then we
20 have discovery to take place --

21 THE COURT: My --

22 MR. SHORE: -- in connection --

23 THE COURT: My view, which I have expressed before, is
24 it's all part of -- it's all happening at confirmation. There
25 isn't going to be a third trial. It's going to happen during

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1 confirmation. That's -- I've said it before. And, yeah, if --
2 it may be that events will -- you haven't wanted that; you've
3 argued that this all ought to be after a confirmation trial. I
4 haven't been persuaded in the past; I'm still not persuaded.
5 Two trials of this is enough for me.

6 MR. SHORE: It is enough for us as well, Your Honor.
7 The problem is I'm getting the answer from some people that
8 what they want to do is try some phase II issues, argue that
9 the rest are moot and, if they are not moot --

10 THE COURT: Well, if they're moot --

11 MR. SHORE: -- then come --

12 THE COURT: -- they're moot. I mean, look, if --
13 we've had this discussion before, okay. So that if -- it'll be
14 tried, but the decision may be that the issue has become moot.
15 It may or may not be; I don't know. We'll see.

16 MR. SHORE: Right. And if it's not, what we don't
17 want -- and hearing Your Honor loud and clear on this point,
18 what we don't want is, 'All right, they're not moot. We're
19 going to have to come back for a third trial.'

20 THE COURT: No, you're not coming back for a third
21 trial. You're going to put in the evidence at the time and
22 I'll make a decision one time.

23 Mr. Kerr, you have a different view of that?

24 MR. KERR: I do not, Your Honor. And again, I -- I do
25 not.

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1 THE COURT: Ms. Levitt?

2 MS. LEVITT: Your Honor, I was just going to point out
3 that I think we made this very clear in the statement of issues
4 for phase I, in which we said that we believe that the
5 confirmation of the plan and the global settlement will render
6 these issues moot. Nevertheless, we understand that they
7 disagree and that those issues may be tried at the time of plan
8 confirmation.

9 THE COURT: Yeah. Mr. Horowitz, you agree with that?

10 MR. HOROWITZ: Exactly, Your Honor.

11 THE COURT: Okay. So you'll be prepared to try your
12 issues --

13 MR. SHORE: Right, right.

14 THE COURT: -- Mr. Shore.

15 MR. SHORE: So we have now -- now we had the official
16 position on everybody's part --

17 THE COURT: You had that official --

18 MR. SHORE: -- that phase --

19 THE COURT: -- position long before today. But go
20 ahead.

21 MR. SHORE: If phase II trial is going forward at
22 confirmation, we have an adversary proceeding, and the phase I
23 scheduling order says we're going to have a phase II scheduling
24 order. We do not have a phase II scheduling order. We asked
25 that we delink the plan protocol from the phase II scheduling

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1 order, and we'll negotiate a phase II scheduling order, then.
2 And then our objections with respect to this confirmation
3 order, which seeks to blend phase II issues and confirmation
4 issues, largely falls away. We have plan confirmation issues
5 that can get addressed in the context of this order; I've got
6 some specific comments on that. And we need, then, a phase II
7 scheduling order, which would then also cover what are the
8 issues that the parties intend to be tried at confirmation as
9 part of phase II.

10 THE COURT: Well, let me put it this way: I -- the
11 discovery protocol will apply to both the phase II issues and
12 confirmation. Okay. The -- from my standpoint, Mr. Shore -- I
13 think -- I didn't go back to look at the transcript, but I
14 think I probably said it, and pretty close to these words, at
15 the time I denied your motion to disqualify the debtors'
16 counsel and disqualify the creditors' committee counsel: I
17 think the ad hoc group and JSNs have essentially been engaged
18 in a no-holds-barred effort to derail or delay confirmation.
19 You've resolved most of the discovery issues along the way; you
20 probably have done better resolving it than if it had been left
21 in my hands.

22 I think that the good-cause requirement that the
23 debtors, with the committee's agreement, have put into the
24 proposed discovery protocol are quite appropriate under the
25 circumstances, because it has seemed to me that the approach

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1 that the ad hoc group has adopted is a scorched-earth approach,
2 making it completely appropriate for the Court to impose the
3 good-cause requirement.

4 With that said, I fully expect that whenever a
5 discovery dispute arises, the parties will meet and confer and
6 resolve the issues; and to the extent they don't, as in the
7 past, they'll come before me and I'll resolve them. But I
8 believe that even in the context of the adversary proceeding,
9 in light of the history of this litigation to date, the Court
10 has the authority to impose the good-cause requirement for
11 further discovery.

12 There've been fourteen million-plus pages of documents
13 produced. If I'm not mistaken, Mr. Shore, you already have
14 access to the -- either all of them or certainly the
15 examiner's -- all the pages that were produced to the examiner.
16 It's all in electronic searchable format. We've had
17 discussions about that before. Where there's fourteen million-
18 plus pages already produced, I don't believe you can simply
19 serve a bunch of discovery requests and tell the debtors, 'You
20 figure out whether the documents are in the database. The
21 database is completely searchable.' You were headed toward the
22 October 15th phase I trial. So I believe all that's
23 appropriate.

24 Now, I read -- on Sunday I read your additional
25 filings, and this morning I read what the debtors have -- the

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1 changes they've further proposed, I think going a long way to
2 accommodating any legitimate issues that the JSNs raised. But
3 the Court's ruling is as follows, and it will be a written
4 order entered today: is to grant the debtors' motion, overrule
5 the ad hoc group and UMB objections. I believe a separate
6 order in the form that's been submitted to me this morning will
7 be entered. So I'm going to enter an order ruling on the
8 motion, but you'll have to submit the proposed order, and I
9 guess you've -- I didn't see -- I mean, I have a redline and a
10 clean copy of what you submitted today; I looked at it quickly.
11 I had another hearing at 10 o'clock, but I did look at it this
12 morning.

13 So the Court's ruling is to grant the motion, overrule
14 the objections, and I will issue a written order.

15 I expect, for the most part, while I think the ad hoc
16 group has badly overreached in many of the things that have
17 occurred in the adversary proceeding to date -- not only in the
18 adversary proceeding but in the bankruptcy case as well -- I
19 think that when you've actually sat down to meet and confer to
20 resolve issues, most have been resolved, and I expect that to
21 continue to happen. And so the debtors and the committee
22 shouldn't think, just because I'm going to sign an order that
23 adds the good-cause requirement, that if in fact they can come
24 forward and say, 'We've searched and put forward competent
25 evidence. They've searched the electronic database. The

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1 specific targeted additional discovery that they're seeking is
2 not encompassed within the fourteen million-plus pages that
3 have already been produced,' I will certainly be very open to
4 listen to those arguments.

5 But I guess what the result is, is that this shifts
6 the ordinary burden, rather than those seeking to block the
7 discovery might have the burden. Here, I believe, now, going
8 forward, that it's the ad hoc group and the trustee that are
9 going to have to show good cause. So that's going to be the
10 Court's ruling.

11 MR. SHORE: Can I be heard on one issue, Your Honor?

12 THE COURT: Quickly.

13 MR. SHORE: Privilege logs. The debtors proposed
14 language this morning that would not require them to even
15 search for whole categories of documents that they would claim
16 would be privileged. It's language I saw on the way down to
17 court this morning; I think it is overbroad; it essentially
18 cuts out not only the requirement to search but any ability to
19 object to the documents. I'm happy to sit down and talk with
20 them about narrowing the scope of that.

21 THE COURT: Mr. Kerr? Do you have the language?

22 UNIDENTIFIED SPEAKER: Your Honor --

23 THE COURT: So I didn't -- when I read this over this
24 morning, Mr. Shore, I didn't focus on that language.

25 UNIDENTIFIED SPEAKER: Your Honor --

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1 THE COURT: I've got a clean and --

2 UNIDENTIFIED SPEAKER: Your Honor, let me tell you
3 exactly --

4 THE COURT: Hold on. Hold on.

5 All right, Mr. Kerr, where is it?

6 MR. KERR: I apologize, Your Honor. I'll tell you
7 exactly where it is. This morning we sent down as Exhibit 2 a
8 blackline.

9 THE COURT: Yes.

10 MR. KERR: And Exhibit 2, starting at the bottom of
11 page 12, paragraph 7 --

12 Do you have a blackline?

13 UNIDENTIFIED SPEAKER: Um-hum.

14 MR. KERR: And where -- what -- I will tell you
15 exactly where we came up with this language.

16 THE COURT: Let me look at it again, okay? Just --

17 MR. KERR: Sure.

18 THE COURT: Just give me a second, okay?

19 (Pause)

20 THE COURT: Go ahead, Mr. Shore, and then I'll let
21 Mr. Kerr respond.

22 MR. SHORE: The problem I have is the lead-in
23 language: "not required to search, produce, identify, on any
24 log, documents," not even on category logs. So they will not
25 be, for example, allowing us to preserve any objection that we

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1 have to their assertion to privilege on joint defense at
2 certain periods of time, whether or not a document is
3 privileged. The -- section vi would preclude any inquiry into
4 any of the FA's work, whether or not it would be deemed to be
5 attorney work product or anything else.

6 So I don't mind that they log it generally and they
7 search for it generally, but to just say that they have no
8 obligation under Rule 26 to even respond such that an objection
9 can be made to that seems overbroad, Your Honor.

10 THE COURT: Mr. Kerr?

11 MR. KERR: Your Honor, what we were attempting to do
12 was not -- was to try to avoid having -- and being forced to
13 log thousands and thousands of entries of documents that
14 would -- there's going to be, I don't think, any dispute that
15 they are either privileged or work product.

16 As part of our search protocol, Your Honor, we collect
17 everything based on what we do, and then we go through and try
18 to determine what falls within the privilege or not. The
19 tremendous burden here, especially given the role of counsel
20 all through this process, as Your Honor is well aware, is then
21 having to log all of those things. So what we've been trying
22 to do is carve some out, such as hard copies of in-house and
23 outside counsel -- clearly going to be privileged and work
24 product -- communications between a client and their outside
25 counsel.

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1 THE COURT: Well, not everything inside in-house
2 counsel's files are going to be -- is going to be privileged.

3 MR. KERR: That's -- you're absolutely right, Your
4 Honor. And if something is not privileged, we'll produce it.
5 The question is the question of logging it. If it is --

6 THE COURT: But how are they supposed to know whether
7 they're supposed to challenge, if you don't log it?

8 MR. KERR: But it's -- well, Your Honor, I guess --
9 what we are prep -- this language comes from the Enron form of
10 order.

11 UNIDENTIFIED SPEAKER: Lehman.

12 MR. KERR: Oh, excuse me; the Lehman form of order,
13 Your Honor. And I think it's trying to do a practical way of
14 determining how you legitimately go through masses of e-mail,
15 masses of documents, where your lawyers are all over it, and
16 trying to find the balance between not having to log it, and
17 log it. And we're trying to do it by category; there's no
18 question about that, Your Honor. I'm trying to come up with a
19 practical solution to doing this.

20 So we -- what we did, in light of Mr. -- in light of
21 the request we got on Friday night about putting a privilege
22 log in there, I told him before, we would be doing privilege
23 logs to the extent we have something like that, but we'd then
24 try to go through and think about it practically --

25 THE COURT: Just let me ask you this.

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1 MR. KERR: -- how do we do this.

2 THE COURT: Take that hard copy of in-house and
3 outside counsel. I would assume that a lot of the paper in the
4 files of in-house and outside counsel was created by others,
5 that they were -- and they were copied on it. So let's assume
6 that there's a memo that was prepared by businesspeople, and a
7 copy of it resides in in-house counsel's file. What is it
8 you're going to do in that circumstance? So are you -- does
9 this mean that the copy of the same document that was located
10 in a businessperson's file, if you're going to assert privilege
11 as to it, it doesn't get logged either?

12 I mean, it's one thing -- let's see if you can respond
13 to that --

14 MR. KERR: Well --

15 THE COURT: -- question.

16 MR. KERR: -- I guess, Your Honor, under that
17 scenario, if we -- the way it's drafted, if we find a
18 businessperson's file and we felt it was privileged, we'd have
19 to log it, and -- but we would not do that if it was in-house
20 counsel's file. And I recognize that that distinction may seem
21 arbitrary, but that --

22 THE COURT: No, it doesn't seem --

23 MR. KERR: -- would be the approach we --

24 THE COURT: -- so arbitrary to me, frankly. I mean --

25 MR. KERR: But that'd be the approach we --

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1 THE COURT: -- it just --

2 MR. KERR: -- we would take, in light of the way we've
3 drafted this. And what -- in reality, I know what our files
4 look like. Our files are largely communications we're having
5 with the client, we -- pulling off things all the time, which
6 reflects our work product; and the same thing with in-house
7 counsel. But if we find a document that is not in in-house
8 counsel's files but in a businessperson's files and we say,
9 'Uh-oh, that is privileged,' we would then have to log it;
10 that'd be absolutely clear.

11 MR. SHORE: But that's not what --

12 THE COURT: Let me stop -- Mr. Shore, stop.

13 Mr. Kerr, take romanette iii: internal documents and
14 communications, solely within -- well, never -- I think I
15 answered my own question. Let me see.

16 MR. SHORE: It's vi is the prob -- or v.

17 THE COURT: Yeah, so what are you doing with romanette
18 v? Okay, this is the point about if -- I'm sympathetic to the
19 problem about the lawyers' files, because they're voluminous at
20 this stage; okay? But this comes back to my point about, if a
21 document is generated by a nonlawyer and sent to the lawyer, it
22 may or may not be entitled to privilege or work product; I
23 don't know.

24 If you -- if your position is 'We don't have to log
25 the copy that's in the lawyer's file' but if the same document

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1 has been found or located in a businessperson's file -- a lot
2 of this is electronic, right? So you -- you've already
3 searched e-mails of a lot of people, nonlawyers, right? And so
4 if you find an e-mail in Mr. X's file -- nonlawyer -- a copy of
5 which was sent to a lawyer, do you log it or don't you log it?

6 MR. KERR: You've asked one question --

7 (Counsel confer)

8 MR. KERR: Your Honor, the reason I'm asking
9 Ms. Levitt --

10 THE COURT: Yeah.

11 MR. KERR: -- is I know there's been a lot of
12 discussion, in the adversary proceeding, on this. And I
13 understand that they -- I don't know exactly how they're doing
14 that in the adversary. I apologize, Your Honor, but we were
15 trying to -- for purposes of this, dealing both with the JSNs
16 and everybody else, trying to come up with a practical
17 solution. I'm more than willing to go back and --

18 THE COURT: I mostly have a question; I want to know
19 what -- I don't know what this --

20 MR. KERR: And I guess, Your Honor --

21 THE COURT: -- does.

22 MR. KERR: -- the way I would answer that is -- the
23 way I would answer that is, if we're going through a
24 businessperson's file and it has a document in it that would
25 be -- under the language as written, if it is a communication

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1 solely with counsel, under this we would not log it; that is
2 correct.

3 MS. LEVITT: And that was the agreement, I believe --

4 THE COURT: You have to speak into the microphone,
5 Ms. Levitt.

6 MS. LEVITT: Sorry.

7 THE COURT: Go ahead.

8 MS. LEVITT: Your Honor, I believe -- and Mr. Shore
9 can correct me if not, but I believe that's the agreement we
10 reached in the context of the adversary, that if it's a
11 businessperson with their counsel, we weren't logging it.

12 THE COURT: Mr. Shore?

13 MR. SHORE: Right, but I -- now we're -- if we're
14 dealing with phase II issues -- so, for example, we had the
15 issue of whether or not an intercompany claim memo is
16 privileged. They have written this in a manner such that it
17 would not have to be searched, logged; no way to object to it,
18 no way to bring the dispute before the Court, or anything else.
19 So phase I and phase II are different. If this order is now
20 covering phase II, that's an issue that has to be resolved.

21 And I'm happy to sit and talk with the debtors about
22 how to fix this list, the way we got to it, on a protective
23 order and scheduling order with respect to phase I.

24 THE COURT: But, Mr. Kerr, a lot of what you have
25 included here I don't have a problem with, in light of the

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1 context of this case, where we are at this time. Okay. So,
2 meaning that communications that are only in the law-firm
3 files, in-house or outside-counsel files, that are between
4 lawyers, that are between the lawyers and the financial
5 advisors in connection with preparing for litigation, fine.
6 But what I -- where I am having a little bit of a problem is,
7 in light of the issues that have been raised, whether they're
8 phase I or phase II, they've been raised consistently, okay.
9 So Mr. Shore gives the example of intercompany claims; clearly
10 an issue we said that's going to be resolved as part of phase
11 II during confirmation. Okay.

12 It may well be that if a businessperson generated a
13 memo and it was sent to -- copied to a lawyer, it may well be
14 privileged; I'm not disputing that, okay. But I don't know. I
15 think that -- so I think you need to tweak this a little bit,
16 okay.

17 I don't know how -- what volume of problems this is
18 going to create for you, but --

19 MR. KERR: Your Honor, if I may.

20 THE COURT: -- because it's very easy -- particularly
21 in the context of threatened or ongoing litigation, it's very
22 easy for businesspeople to just begin copying lawyers on
23 everything. It doesn't make it privileged just because they
24 copied the lawyers on everything.

25 MR. KERR: Your Honor, I would agree with that, and

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1 you're right that we would -- we would, as we would at all
2 times, take a look at a document and understand both the
3 context and what it was and, if it was not privileged, we would
4 produce it.

5 THE COURT: Yeah, but I don't want a doc -- I don't
6 want -- it can't all be left, at the end of the day, to your
7 judgment as to what is or isn't privileged. I think -- I'm
8 prep -- in light of the circumstances and timing of this case,
9 I'm certainly prepared to sign an order that relieves you of
10 the obligation of logging everything in the lawyers' files, in-
11 house, outside-counsel files. Where I'm having some problem
12 is, for those documents that are -- because if it's an e-mail,
13 it's captured, right? And I think you should have to log when
14 the -- if it's found in the files of a nonlawyer, you should
15 have to log it.

16 MR. KERR: Let me give you just one practical example,
17 Your Honor --

18 THE COURT: Go ahead.

19 MR. KERR: -- that we're wrestling with as well.
20 Again, since Mr. Kruger was appointed as CRO, we routinely
21 communicate with Mr. Kruger by e-mail. If -- I have never
22 counted how many -- we've searched all of Mr. Kruger's e-mails,
23 but how many -- I think it's not -- it's a reasonable
24 assumption, and a reasonable assumption (sic), to assume that
25 the communications we're having with Mr. Kruger are privileged.

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1 And to now have to log all of that seems to me to be an
2 unnecessary burden and expense that should not be done here.

3 THE COURT: Mr. Shore?

4 MR. KERR: There may be other --

5 THE COURT: Mr. Shore --

6 MR. KERR: -- folks that are different.

7 THE COURT: -- what's your position on that?

8 MR. SHORE: My position is -- I saw the list this
9 morning, of what they want to carve out; I've got some initial
10 reactions to a number of them; one of them, for example: no
11 clients and lawyers need to be logged, or no FAs need to be
12 logged, or -- this is a new one -- communications between
13 Morrison & Foerster and the CRO. I don't -- whether I have a
14 problem with that or not, my sense is there're going to be some
15 topics that are not going to be privileged. If what's ending
16 up happening is they're just forwarding on materials for
17 Mr. Kruger to review, such that that's the only way we can see
18 what Mr. Kruger is reviewing, I can -- as I said, I can refine
19 this list with them. I think it would be helpful for us to
20 have a discussion.

21 THE COURT: Well, put it this way --

22 Mr. Kerr --

23 MR. SHORE: Can I make --

24 THE COURT: Wait, wait, just let me -- it goes back to
25 my comment earlier about I get theirs Friday night, which I

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1 can't review till yesterday; I get yours this morning, which I
2 haven't -- you know, I looked at quickly, but -- okay. It's --
3 it is unfair, because you did make changes; a lot of them are
4 very helpful, from what I've seen. But you made changes. In
5 fairness, the objectors are entitled to an opportunity to
6 review it, in more than -- not for very long, but they're
7 entitled to an opportunity to review it.

8 So what I'm going to do is this: I'm granting your
9 motion. Okay. There'll be a written order entered to that.
10 You need to meet and confer promptly to see if you can resolve
11 issues that are reflected in the changes that you made and
12 provided this morning. Okay. And hopefully you'll be able to
13 resolve those. You've gotten some guidance from me. I'm
14 sensitive to this issue about communications with Mr. Kruger,
15 okay. But I come back to -- I know your -- I don't know what
16 the volume of documents we're talking about at this stage. I'm
17 sure the volume that have just -- that have gone between
18 Mr. Kruger -- because he's probably been copied on most
19 everything. And I'm not going to use that as a way to sort of
20 open this door to put -- because I could see this burden is
21 enormous, okay, and I agree with that. But if --

22 Well, I'm granting your motion. I'm directing you --
23 I'm not signing the order yet. You need to try and see if you
24 can resolve the remaining issues; to the extent you can't --
25 how much time do you want to do that, Mr. Shore?

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1 MR. SHORE: Can you guys talk at 5 today?

2 MR. KERR: Yeah, we can -- I can -- we can work at 5
3 today. Actually, I have another call at 5. We'll work it out.

4 THE COURT: Okay. I'm just trying to think -- because
5 I want to get this resolved this week, and Mr. Shore --

6 (Counsel confer)

7 MR. KERR: We'll speak tonight, Your Honor.

8 THE COURT: Okay. I mean, it's got to be able -- as
9 far as I'm concerned, it has to be resolved by tomorrow at
10 noon, because I just figure --

11 MR. KERR: We'll work to meet that deadline, Your
12 Honor.

13 THE COURT: Mr. Shore, Mr. Uzzi's coming -- running
14 forward here.

15 MR. KERR: Thank you, Your Honor.

16 THE COURT: He got very concerned all of a sudden
17 there.

18 MR. UZZI: No, Your Honor, I'm just trying to balance
19 out --

20 THE COURT: Just make your --

21 MR. UZZI: -- the podium a little bit.

22 THE COURT: -- make your appearance, yeah.

23 MR. UZZI: Gerard Uzzi from Milbank Tweed, on behalf
24 of the ad hoc group.

25 Your Honor, just an admin point that I'd feel

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1 necessary putting on the record, because at the disclosure-
2 statement hearing I informed you that with respect to the
3 mediation order, the parties had agreed to extend it through
4 August 30th. It has not been extended again at this point. So
5 we're keeping an open dialogue with Judge Peck. We do have the
6 ability, we believe, to extend it, with the agreement of the
7 parties, in the future. And so perhaps I'll be before you
8 again letting you know that we've gone back in, but right now I
9 just want to inform the Court that the mediation is, I
10 think, -- in Judge Peck's words -- suspended.

11 THE COURT: Okay.

12 MR. UZZI: Thank you, Your Honor.

13 THE COURT: Anybody else have anything they want to
14 add?

15 All right, so, communicate with me as soon as you can.
16 And, I mean, I'm hopeful. I'm not going to hold off on
17 entering an order with respect to the motion itself; I'll
18 reflect that the parties continue to discuss some specific
19 provisions in it, because then there'll have to be a separate
20 order entered on the discovery protocol itself.

21 And I just -- the last thing I would say is,
22 Mr. Shore, if you have a proposed statement of issues for phase
23 II, get it to the debtors as soon as you can, and start working
24 on it now. I didn't say -- I've said I expect that to happen;
25 I didn't put a deadline on submitting it. I'm sure I'm going

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1 to be seeing you plenty in the meantime. So --

2 MS. LEVITT: Your Honor, could I just make --

3 THE COURT: Go ahead.

4 MS. LEVITT: -- one point of clarification? In --

5 THE COURT: Just identify yourself, for the record.

6 MS. LEVITT: This is Jamie Levitt on behalf of the
7 debtors.

8 Your Honor, the statement of issues that the Court
9 entered actually includes phase I and phase II. We tried to --

10 THE COURT: Yeah, but it left some stuff open. I
11 mean, I think -- I looked at it again. I don't have it in
12 front of me today, but I did look at it again last week.

13 MS. LEVITT: Okay. We'll work with the --

14 THE COURT: I want to be sure -- I mean, the main --
15 okay, I'll accept your word that it does. My main focus, and I
16 assume everybody's main focus, is what issues are we trying
17 starting October 15th. Okay. And I want to know sooner rather
18 than later what are the issues we're trying as part of phase II
19 during the confirmation hearing. Okay?

20 MS. LEVITT: Understood. Thank you, Your Honor.

21 THE COURT: Thank you very much. All right, we're
22 adjourned.

23 (Whereupon these proceedings were concluded at 11:49 a.m.)
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RULINGS

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Page Line

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Debtor's Motion for Authorization to 26 4

7

Establish and Implement Procedures in

8

Connection with Discovery Related to Plan

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Confirmation, granted, and objections of the

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ad hoc group and UMB overruled.

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The parties are to meet and confer to 38 10

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resolve any discovery disputes.

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript is a true
and accurate record of the proceedings.



DAVID RUTT

AAERT Certified Electronic Transcriber CET**D 635

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Date: September 3, 2013

September 3, 2013

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